Diese Website verwendet Cookies von Google, um Dienste anzubieten und den Traffic zu analysieren. Deine IP-Adresse und dein User-Agent werden zusammen mit Messwerten zur Leistung und Sicherheit für Google freigegeben. So können Nutzungsstatistiken generiert, Missbrauchsfälle erkannt und behoben und die Qualität des Dienstes gewährleistet werden.

WEITERE INFORMATIONEN OK

Wednesday, February 01, 2006

Mechanism, not policy

If Mike Huben is saying that the law should be about mechanism, not policy, then I heartily agree. Yet Mike gets this philosophy blindingly wrong when applying it to the law.

It is the highly evolved common law that got this wisdom most right:

Contract law: provide mechanisms for making and enforcing contracts, not policy about who can contract with whom for what.

Property law: provide mechanisms for transferring, collateralizing, devising, and protecting the quiet use of property, rather than policy dictating who can build what where.

Tort law: use the edges or surfaces of the body, property, etc. as boundaries others may not cross without consent of the possessor, rather than dictating detailed rules for each possible harm.

Et cetera. Under the common law we "write" (sometimes literally, as with contracts or wills) the policy of our own lives. The common law "create[s] user freedom by allowing them to easily experiment..." as Mike says about X-Windows. Our judges are supposed to accumulate a common law, and the legislatures write statutes, that are a "systems code" for our interactions with others. We, by our own agreements with those we specifically deal with, "write" within these basic mechanisms the rules that govern our own interactions with these others. The guiding philosophy of our legal code should indeed be mechanism, not policy.

Of course, law as well as software is not quite this simple, and judges and legislatures sometimes (but not nearly as often as they would like to think) must make some hard policy choices for exceptions and edge cases. Also, as Mike proves in his essay with absurd and awful statements such as "I think that the rights specified in the Constitution and Bill of Rights are there for purposes of mechanism, not to directly protect individual rights," what is "mechanism" and what is "policy" is often in the mind of the beholder. In this case, the Founders (which for the Bill of Rights are the anti-Federalists, not generally the Federalists as Mike suggests) clearly had in their minds that the main purpose of the mechanisms was to protect individual rights, especially as those rights had evolved under the common law which Locke and the Constitution summarized as "life, liberty, and property." "Life" and "liberty" occur three times in the Constitution; "property" is protected in four different places. Mike's beloved welfare state, on the other hand, occurs nowhere in the Constitution. Much of the Constitution was intended to protect the mechanisms of the common law from the hubristic policymaking of legislatures and the arbitrary actions of government officials.

Pages

- Home

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

"Reading material that is eclectic, challenging and endlessly fascinating." -- Sean McGrath, Propylon

"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

View my complete profile

The recent great strides of progress in human history, such as the Industrial Revolution, the Information Revolution, and the abolition of slavery, were propagated by common law countries. Countries lacking the common law have often fallen into authoritarianism and totalitarianism. The common law has proven that mechanism, not policy, is a very wise philosophy for law as well as for systems software. Mechanism, not policy, is a philosophy that all of us should aspire to when opining or voting on laws, and it's a philosophy judges should apply when interpreting them.

Posted by Nick Szabo at 10:21 AM

1 comment:

Mike Huben said...

My response is at Mechanism, Not Policy response.

8:40 PM

Post a Comment

Newer Post Home Older Post

Subscribe to: Post Comments (Atom)

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ▼ 2006 (130)
  - ► December (4)
  - ► November (7)
  - ► October (15)
  - ► September (15)
  - ► August (20)
  - ► July (5)
  - ► June (10)
  - ► May (4)
  - ► April (3)
  - ► March (11)
  - ▼ February (10)
    - The irreducible complexity of society
    - The constitutionality of federal charity
    - Some lost frontier wisdom
    - The Roundhead Revolution?
    - Moot court fun
    - Time, sacrifice, and value
    - Where are you now?
    - From accounting to mathematics
    - Executive power and the interpretation of laws

Mechanism, not policy

► January (26)

► 2005 (44)

Simple theme. Powered by Blogger.